IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-81

RICHARD NIXON,
Petitioner,

v.

RONALD V. DELLUMS, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

I. This case does not warrant a grant of certiorari. The principles underlying petitioner's claim of privilege have already been decided by this Court. The remaining issue is one of specific application in a specific factual context — and that issue will not be framed until the case is remanded to the District Court to carry out the mandate of the Court of Appeals.

In *Nixon v. Administrator of General Services*, ____ U.S. ____, 45 U.S. L.W. 4917 (June 28, 1977) and *United States v. Nixon*, 418 U.S. 683 (1974), this Court held that (1) a president's claim of privilege based upon a general interest

in confidential communications is a qualified privilege; (2) that privilege must yield when its assertion would unduly interfere with the administration of justice or other public interest in disclosure; and (3) the judgment in any particular case requires an evaluation of the encroachment on presidential confidentiality as compared to the importance of the information sought to effect justice in a specific context.

The fact that the question now arises in the context of civil litigation, rather than in a criminal prosecution or as a matter of public historical interest, does not alter the matter or require a new decision by this Court. The privilege is not absolute, and the alleged intrusion must be evaluated and balanced against the need in each case.[1,2]

II. The standards applied by the Court of Appeals in this case in affirming the decision of the District Court were consistent in all respects with the standards utilized by this Court in *Nixon v. Administrator, supra* and *United States v. Nixon, supra.*

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[1]The privilege has consistently been viewed as merely presumptive and the various courts which have considered the question have balanced the possible detrimental effects of the disclosure against the demonstrated necessity for the information. *Nixon v. Administrator, supra, U.S. v. Nixon, supra* at 708, *Senate Select Committee v. Nixon,* 498 F.2d 727, 730 (D.C. Cir. 1974) (en banc); *Nixon v. Sirica,* 487 F.2d 700, 717 (D.C. Cir. 1973) (en banc); *Committee for Nuclear Responsibility v. Seaborg,* 463 F.2d 788, cert. denied, 404 U.S. 917 (1971); *Sun Oil Co. v. United States,* 514 F.2d 1020 (Ct. Cl. 1975), *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318 (D.D.C. 1966), aff'd 384 F.2d 979, cert. denied, 389 U.S. 952 (1967).

[2]Petitioner's claim that there has and will continue to be a proliferation of civil litigation seeking presidential materials or tapes (Petition at 11) is not well founded. He cites only six cases in addition to the instant case in which litigants have sought such materials. None of the cited cases was filed after 1975. The feared proliferation has not materialized.

In *United States v. Nixon* this Court weighed the importance of the general privilege of confidentiality of Presidential communications against the impact that privilege would have on the fair administration of criminal justice. *Id.* at 711. The Court evaluated the extent to which disclosure would interfere with the President's ability to receive candid advice from his advisors and compared its likelihood and significance to the importance of the due process requirement of production of evidence as to which there was a demonstrated, specific need. *Id.* at 712-713. In *Nixon v. Administrator, supra,* the Court utilized the same methodology in upholding the constitutionality of the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107, against a claim of Presidential privilege. Among the interests that the Court said outweighed the claim of privilege was the fact that

> . . . Congress repeatedly referred to the importance of the materials to the judiciary in the event that they shed light upon issues in *civil or criminal litigation,* a social interest that cannot be doubted. *Id.* 45 U.S. L.W. at 4925 (emphasis added).

In this case both the Court of Appeals and the District Court gave Nixon's claim at least the same weight as did the Court in *Nixon v. Administrator.*

Both courts assumed, *arguendo,* that a former President may assert the privilege but gave it less weight because the incumbent was not also asserting it. This is consistent with the treatment accorded to Nixon's claim by this Court in *Nixon v. Administrator, supra,* 45 U.S.L.W. at 4923-4924. The Court there decided what was assumed in this case — that the former President could assert the privilege, but went on to state that the fact that neither subsequent president has supported the claim

detracts from the weight of his contention that the Act impermissibly intrudes into the executive function and the needs of the Executive Branch. *Id.*

Similarly, the analysis in the court below of the weight to be given plaintiff's need for discovery was in accord with the analysis of this Court in *U.S. v. Nixon.*

> . . . [T]here is a strong constitutional value in the need for disclosure in order to provide the kind of enforcement of constitutional rights that is presented by a civil action for damages, at least where, as here, the action is tantamount to a charge of civil conspiracy among high officers of government to deny a class of citizens their constitutional rights and where there has been sufficient evidentiary substantiation to avoid the inference that the demand reflects mere harrassment . . . . the possibility of disclosure in such instances is not unlike the possibility of disclosure in criminal cases — the infrequent occasions of such disclosure militate against any substantial fear that the candor of Presidential advisers will be imperiled (Court of Appeals Slip Op. at 9, Pet. App. E, p. 17a).[3]

[3]The requisite showing of particularized need for disclosure has been amply demonstrated. The record indicates that the anticipated May Day demonstrations were a matter of considerable presidential attention. At the first trial, plaintiffs introduced minutes of several top-level meetings in the Attorney General's office during the last few weeks prior to the May Day demonstrations which were chaired by Attorney General Mitchell or Deputy Attorney General Kleindienst. The nature and purpose of these meetings was to discuss ways and means of "handling" the anticipated demonstrations. High-ranking presidential aides John Erlichman and John Dean attended most of these meetings and reported to the group President Nixon's concern about possible disruption. At one meeting Mr. Erlichman ". . . stated that the President wanted the city kept open if it took 100,000 [troops]. He added that if we

Thus, since the opinion of the court below presents no departure from existing law and is consistent with this Court's recent decisions in all material respects, this Court need not grant certiorari.

III. Review by this Court of the order of the court below is premature. In *Nixon v. Administrator* this Court approved the legislative scheme of the Presidential Recor-

[3](continued)
were short on troops someone will be in big trouble. He said there was to be no misunderstanding about that and no fine tuning was needed and he said if it turned out to be 'hot air' that would be fine." Minutes of meeting of May 1, 1971, p.9 (Plaintiff's Ex. 12-A). The circumstances giving rise to plaintiffs' need for the tapes, and the critical nature of this evidence to plaintiffs' case was appropriately summarized by the District Court, and expressly affirmed by the Court of Appeals, as follows:

> Other discovery has established that high-level meetings were held at the Justice Department to plan for the May Day demonstrations. Defendant Mitchell, according to deposition testimony, was briefed on these meetings. At least one top-level White House aide was present at each of these meetings after April 16, the initial date with which the subpoena is concerned. The almost certain inference must be that these aides reported to Nixon on the progress of their planning, and took his reactions and directions back to the Justice Department. It is quite possible, as plaintiffs suggest, especially given the close relationship between Nixon and Mitchell, that the two men discussed the matter either personally or by telephone. If so, the conversations will be among those subpoenaed. And whatever recorded conversations occurred in the White House with regard to the Administration's plans for dealing with the demonstrators could constitute the most direct and central sort of evidence for plaintiffs' case. The Court can scarcely imagine what could be more relevant to the grave allegations in the present case than the actual words of those alleged to have been the conspirators. Nor can the Court perceive any alternative means by which plaintiffs could obtain comparable discovery. App. E, p. 20(a)

dings and Materials Preservation Act, 44 U.S.C. §1207, which required professional Government archivists to screen, *inter alia*, all of the tape recordings of presidential conversations. Since the recordings which are the subject of this litigation are among those subject to that screening, Petitioner's interest in preventing that review has already been adjudicated by this Court.

In its original, January 28, 1977 opinion, the Court of Appeals directed the District Court to appoint a professional Government archivist initially to review the tapes to identify, and submit to the Court, those portions relevant to this litigation. Nixon's right to be present during the review and his right to assert any rights, defenses or privileges prior to transmission of the materials to plaintiffs was recognized by the court. (App. E, p. 24a-25a). On April 14, 1977, the Court of Appeals modified this provision, at petitioners' insistence, to make the appointment of an archivist permissive rather than mandatory in the District Court. (Pet. App. C, p. 6a). However, in light of this Court's subsequent decision in *Nixon v. Administrator*, it is likely the District Court will appoint an archivist to perform the initial screening and review.

In the event that the archivists' review produces relevant conversations, petitioners may then assert any claims of privilege in a specific factual context. To the extent that material relevant to plaintiffs' claim is found, it may be that petitioner will not object at that stage to the disclosure. Adjudication of issues of privilege should properly await a specific factual context which will allow the issues to be more precisely developed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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